

International trade regulation beyond Doha: The new EU-Canada free trade agreement

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In

a recent discussion at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Martti Koskenniemi, one of the most prominent international lawyers of his generation, mentioned that the development that currently concerns him the most is [the Transatlantic Trade and Investment Partnership \(TTIP\)](#). This bilateral free trade agreement currently negotiated by the United States and the European Union is part of a broader tendency in the regulation of international trade: regionalism.

Regionalism

In the last two decades, bilateral and plurilateral trade agreements have occupied trade specialists, media, and the public. The failure of the WTO for more than a decade now to deliver a *global* trade agreement in Doha has contributed to a flurry of regional trade agreements (RTAs). Their growth in number is impressive. There are currently [262 RTAs in force registered with the WTO](#) and this number is expected to grow. Their scope is also impressive. Modern RTAs do not suffice with tariff-cutting. They go far beyond, covering sensitive issues of environmental protection, technical standards, labour rules, and investment. That means in turn that sophisticated RTAs, like those concluded by developed OECD economies, are not anymore the sole province of trade lawyers – they make newspaper headings, engage civil society, and motivate political contestation.

The EU – Canada Comprehensive Economic and Trade Agreement (CETA)

Although TTIP, the agreement troubling Martti Koskenniemi, will certainly take some more time to conclude, there is a recent development that might be already sufficient to get a glimpse at the future international trading system. [The EU – Canada Comprehensive Economic and Trade Agreement \(CETA\)](#), on which political agreement was reached on October 18, 2013, deserves a closer look. CETA is indeed a *comprehensive* agreement. Broader in scope and deeper in ambition than the historic North American Free Trade Agreement (NAFTA), it covers almost all aspects of Canada-EU trade, from tariffs to technical standards, investment, and professional certifications. Moreover, it establishes innovative institutions to allow for ongoing transatlantic regulatory coordination. Covering the full spectrum of economically significant regulation, CETA is a test case for the TTIP but also a standard-setter for international economic governance in general. It projects the understanding of two highly developed economies on how future international regulatory standards and procedures should look like.

Content

A blog entry cannot even cover the basic elements of an agreement as broad as CETA. This selection will focus on the basics from the perspective of international economic law: trade in goods, services, and rules on investment.

Trade in goods

Product coverage in CETA is extensive. Of the EU's more than 9,000 tariff lines, almost 98 percent will be duty-free when CETA comes into force and another one percent will be eliminated over a period of up to seven years. In a modern FTA, like CETA, however, trade liberalization goes far beyond tariff-cutting and the reduction of other border barriers to trade, such as those connected with customs administration. The most important, and potentially contestable, rules address non-tariff barriers to trade, such as technical standards, intellectual property rights, and public procurement rules. Compared to tariffs, those disciplines are much more difficult to agree on and to implement. Often they are directly connected with non-trade societal values, such as environmental protection or labour standards. Regarding technical standards, CETA largely builds on the existing rules of the WTO Agreement on Technical Barriers to Trade. It further develops mainly three points. Firstly, it specifies the procedure through which a technical regulation be recognized as equivalent to its counterpart regulation adopted by the other party. Secondly, it allows certain regulatory bodies in Canada and the EU to accept each other's test results and certifications. Thirdly, provides for public participation of foreigners in the development of technical regulations.

Trade in services

Around half of the overall GDP gains for the EU are expected to come from trade in services. Unlike the WTO's General Agreement on Trade in Services (GATS), CETA

adopts NAFTA's "negative list" approach to the liberalization of services. It does not only liberalize a select few service sectors, but all service sectors, except for those expressly excluded. Importantly, CETA also contains a framework for establishing "mutual recognition agreements". Traditionally, regulatory requirements, set by professional regulatory bodies, often professional associations, are a significant barrier for providing cross-border services. Under CETA, the relevant professional organisations or authorities have the option to agree on equivalent education and experience standards and conclude mutual recognition agreements.

Investment

Investment was another hotly negotiated issue. CETA builds on both countries' past experience with investment rules, but also contains important innovations. For example, CETA offers a list of cases that constitute breach of the "fair and equitable treatment" obligation. This includes "denial of justice in criminal, civil or administrative proceedings" and "fundamental breach of due process", including a fundamental breach of transparency in judicial and administrative proceedings. Regarding the investor-state dispute settlement (ISDS) system, CETA introduces for the first time a binding Code of Conduct for arbitrators as well as protections against frivolous claims. In line with the [new UNCITRAL rules on transparency in ISDS](#) it also requires that all respective documents shall be public, all hearings open, and that interested parties (including NGO's) can make submissions. Fears regarding adjudicators' activism are also checked through a mechanism that allows contracting parties to issue binding interpretations on contested clauses.

Outlook

CETA will create a transatlantic space of virtually zero tariffs, much more liberal trade in services, and closer regulatory coordination. Agreement was not easy. Different approaches in IP protection, generic medicines, health standards, and environmental protection had to be accommodated. And many of those issues are likely to resurface again as questions of interpretation to be addressed by international administering or adjudicating bodies. With the Doha Round still in trouble, the so-called "spaghetti bowl" of regional trade deals like CETA can only be expected to get denser and more complex. Regional free trade agreements of the ambit of CETA are indispensable for modern global economy. They have proven their potential in eliminating many of the obstacles that impede the better allocation of world resources and the fairer reward of productivity and innovation. However, the main concern of legal scholars and civil society is a valid one. Do negotiations culminating to agreements like CETA and the institutions they create, such as investment arbitration, provide for fora allowing fair political contestation and the accommodation of free trade with other societal values? There is definitely no easy answer to that one. Only much work to be done by international lawyers, trade experts, and negotiators.